In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1113

ALAN MCSURELY, ET AL., APPELLANTS

v.

THOMAS B. RATLIFF, ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO DISMISS

In light of this Court's prior decision to grant the stay requested by appellants, we assume that the Court has determined that at least some of the questions raised by appellants are substantial. Thus, we shall address ourselves solely to the question whether this Court has jurisdiction to hear this case under 28 U.S.C. 1253.

On August 11, 1967, officials of Pike County, Kentucky, arrested the McSurelys under a warrant charging seditious activities in violation of a Kentucky statute (Ky. Rev. Stat. 432.040). In connection with the arrests, the officials seized numerous books, pamphlets and documents. Invoking the doctrine of

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Dombrowski v. *Pfister,* 380 U.S. 479, the McSurelys brought an action in the federal district court to enjoin the prosecution. On September 14, 1967, a three-judge district court held the statute unconstitutional on the grounds of vagueness and federal preemption, and enjoined the prosecution. The court's order further directed the Commonwealth Attorney to hold the material in safekeeping during the 60-day appeal period.

On October 16, 1967, while the appeal period was still running, subpoenas calling for the production of certain of the seized documents were issued by the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. Copies of the subpoenas were served on the McSurelys and the Commonwealth Attorney. Shortly thereafter, the McSurelys moved the court for an order prohibiting the Commonwealth Attorney from turning over the documents to the Subcommittee, and requiring him to return them immediately. The United States appeared as an *amicus curiae* to oppose the motion. On October 30, 1967, the three-judge district court overruled the McSurelys' motion and directed the Commonwealth Attorney to comply with the Subcommittee's subpoena.

The McSurelys thereupon applied to this Court for a stay. They asserted that the decision of the district court which ordered the Kentucky Attorney General to comply with the Subcommittee's subpoena deprived them "of the legal rights they would otherwise have to resist legislative subpoenas *duces tecum*" (Appellants' Application For Emergency Relief, filed No-

vember 2, 1967, p. 4). In response, we stated that "the Committee has no purpose to prevent the applicants from securing a judicial determination of any defenses which they may have" (Memorandum of the United States on Application for Emergency Relief, p. 2). Recognizing that appellants could not test the subpoenas by contempt because the documents were not in their possession, we suggested that appellants be given an opportunity to file their objections to the subpoenas in the district court. On November 10, 1967, this Court entered an order granting appellants five days in which to file with the district court their objections to the subpoenas. On November 15, 1967, appellants did so, and on December 13, 1967, the three-judge district court overruled their objections. This appeal is from that order.

We agree that the three-judge court was properly convened to pass upon appellants' application to enjoin the Kentucky prosecution. However, we believe that an examination of the procedural history leads to the conclusion that, under the holding of *Commission* v. *Brashear Lines*, 312 U.S. 621, appellants' subsequent challenges to the Subcommittee's subpoenas should have been decided by the single district judge. Therefore, we conclude that appellants' appeal from the decision sustaining the subpoenas lies to the court of appeals and not to this Court.

In *Commission* v. *Brashear Lines, supra,* certain truck operators had filed suit in the federal court to enjoin enforcement of allegedly unconstitutional features of the Missouri Bus and Truck Law. A single district judge granted a temporary restraining order,

under which the truck operators were required to post bonds, and set the matter down for hearing before a three-judge court. After the three-judge court ruled that the statute in question was constitutional and vacated the restraining order, the Public Service Commission filed a motion seeking an assessment against the truck operators and their sureties for damages resulting from the restraining order. In passing on the propriety of having the three-judge court consider that motion, this Court stated:

> We are of the opinion that the two judges called in under § 266 to assist the district judge in passing upon the application for injunction should not have participated in consideration of the motion to assess damages. The limited statutory duties of the specially constituted three judge District Court had been fully performed before the motion for assessment of damages was filed. For § 266 of the Judicial Code provides for a hearing by three judges, instead of one district judge, only in connection with adjudication of a very narrow type of controversy—applications for temporary and permanent injunctions restraining state officials from enforcing state laws or orders made pursuant thereto upon the ground that the state statutes are repugnant to the Federal Constitution. The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called. Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judge requirement of § 266 had no application. [312 U.S. at 625.]

We perceive no adequate basis for distinguishing the situation in the present case from that in *Brashear*. Here the "limited statutory duties of the specially constituted three judge District Court" were concluded when that court entered its order holding the Kentucky sedition statute unconstitutional and enjoining the prosecution of appellants. The present controversy as to the validity of the Subcommittee's subpoenas has nothing to do with enjoining the operation of a State statute and thus has no substantial relationship to the purpose for which the three-judge court was convened. Indeed, the dispute here involves parties other than those involved in the action to enjoin the enforcement of the Kentucky statute; the controversy is between appellants and the Subcommittee, the Commonwealth Attorney being merely a nominal party because he has custody of the records.[1]

Appellants' present action is in substance a suit to quash the Subcommittee's subpoenas.[2] There can be no question that such an action could not normally be heard by a court of three judges. Nor would the

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[1] In fact, at the hearing before the district court on December 5, 1967, the Commonwealth Attorney made the following Statement: "I would like to move the court to remove these materials from my custody, and of course as far as we are concerned it's dead now—the criminal prosecution—and we really have no reason that I know of to keep these materials in Pikesville. I would rather think the court might want to put them in the custody of the Marshal at this point" (Tr. 60).

[2] At the hearing below, counsel for appellants concluded his argument by stating: "[W]e move that the subpoenas of the McClellan Committee be quashed" (Tr. 85).

fact that the documents in question are in the hands of a State official compel the convening of a three-judge court. See *Rorick* v. *Board of Commissioners,* 307 U.S. 208; *Moody* v. *Flowers,* 387 U.S. 97, 102. Thus, there was no occasion for the three judges who had heard the injunctive proceeding to pass on appellants' objection to the Subcommittee's subpoenas.

Since appellants' application to invalidate the Subcommittee's subpoenas is, in any real sense, completely independent of their original action to restrain the enforcement of the Kentucky sedition law, this case is clearly distinguishable from the situation before the Court in *Bibb County Board of Education* v. *United States,* 389 U.S. 215, on which appellants rely.[3] In that case a three-judge court which had been

[3] Appellants cite a number of cases for the proposition that, once a three-judge court is properly convened, it has the jurisdiction to determine all questions in the case (Jurisdictional Statement, p. 36). However, as was pointed out in *Brashear,* all that these cases hold is that a three-judge court "has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties" (312 U.S. at 625 n. 5). As noted above, the questions here presented do not pertain to the prayer for relief against the Kentucky sedition statute, and the controversy here is not between the same parties as the controversy which required the convening of a three-judge court.

Appellants also argue that because the documents involved are in the custody of the three-judge court, no other court would have jurisdiction to enter an order affecting them. However, a single district judge and a three-judge district court are not separate courts in the same sense that State and federal courts are separate. Compare *United States* v. *Bank of New York Co.,* 296 U.S. 463 (federal court may not entertain suit to dispose of assets in custody of State court). It is clear from *Commission* v.

convened to consider a suit to enjoin State officials from enforcing State statutes designed to prevent desegregation of schools had ordered the State officials to submit a Statewide desegregation plan. When the Bibb County Board of Education refused to cooperate with the State officials in their efforts to comply with the court's order, the court granted a motion to join Bibb County as a defendant and ordered it to desegregate. Thus, the decree as to Bibb County was clearly ancillary to the proceedings against the State officials since it was necessary to accomplish the essential purpose for which the court had been convened—to enjoin on a Statewide basis the operation of State laws designed to prevent desegregation. Here, on the other hand, the essential purpose in convening the three-judge court was accomplished when the State was enjoined from prosecuting appellants under the sedition statutes. The question of the validity of the Subcommittee's subpoenas is a discrete issue.

Finally, we cannot agree with appellants that, if this Court does not have jurisdiction on direct appeal, it should exercise its extraordinary power under 28 U.S.C. 1254(1) to issue a writ of certiorari before judgment in the court of appeals. We question whether this case has the type of "imperative public importance" which, in the past, has prompted this

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Brashear Lines, *supra*, that when the purpose for which the two additional judges were called has been fulfilled, a single judge can dispose of remaining questions in the lawsuit, even though these questions would normally be decided by the same "court" which heard the original suit.

Court to take a case before judgment in a court of appeals. See Rule 20 of this Court; compare *Youngstown Co.* v. *Sawyer,* 343 U.S. 579; *United States* v. *United Mine Workers,* 330 U.S. 258; *Ex parte Quirin,* 317 U.S. 1.[4] While expedition is in the government's interest, we cannot say that this case meets the standards previously applied by this Court in adopting that extraordinary procedure.[5]

CONCLUSION

For the reasons stated, the appeal should be dismissed for want of jurisdiction.[6]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

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[4] It should be noted that while appellants have filed a protective notice of appeal, as of the date of the filing of this memorandum, appellants have not docketed the case in the court of appeals—a prerequisite to the exercise of this Court's power to review before judgment in the court of appeals. Stern & Gressman, *Supreme Court Practice* (3d ed.) at 19. This defect, of course, could be easily remedied.

[5] There is no reason to believe that a resort to the normal appellate process will result in undue delay. The court of appeals can be expected to take reasonable action to see that this matter is handled expeditiously. Cf. *Aaron* v. *Cooper,* 357 U.S. 566.

[6] Under this Court's order of January 29, 1968, the stay automatically expires on such a dismissal. However, appellants will then be able to petition the court of appeals for appropriate relief *pendente lite.*

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